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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 589

A. MAGNANO COMPANY, APPELLANT,

vs.

G. W. HAMILTON, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code, § 266 (28 U. S. Code, § 380), reading, to the extent relevant here, as follows:

> "* * * The requirement respecting the presence of three judges shall also apply to the final hearing in

such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

The Statute of the State the Validity of Which is Involved.

The validity of Chapter 23 of the Laws of 1931 of the State of Washington, imposing a tax of fifteen cents per pound on butter substitutes, is involved. The pertinent provisions thereof are as follows:

"CHAPTER 23

"(Laws of 1931)

"An Act relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately.

"Section 1. (*a*) The term 'butter substitute' whenever used in this act shall be held and construed to mean and include any compound or compounds of animal or vegetable fats, such as tallow, beef fat, suet, lard, lard oil, suine, lardine, intestinal fat, offal fat, cocoanut oil, olive oil, cottonseed oil, peanut oil, in combination with milk, butter or any product of milk or butter, either colored or uncolored, that does not contain eighty per cent (80%) of milk or butter fat, and is sold or used as a substitute for butter.

"(*b*) The term 'distributor' whenever used in this act shall be held and construed to mean and include any person, firm or corporation which produces, refines, manufactures or compounds and thereafter sells such butter substitute in the state of Washington for use and sale in this state, or who imports and sells such butter substitute into this state, except as hereinafter provided.

"Sec. 2. That in addition to the taxes now provided for by law each and every distributor, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of representatives or agents in this state, in the sale of butter substitutes as herein defined, shall not later than the fifteenth day of each calendar month render a sworn statement to the director of agriculture of the state of Washington of all such butter substitute sold by him or them in the state of Washington during the preceding calendar month, and pay an excise tax of fifteen cents per pound on all butter substitutes so sold as shown by such statement in the manner and within the time hereinafter provided.

* * * * * * *

"Sec. 4. Every distributor of such butter substitute shall render to the director of agriculture of the state of Washington, on or before the fifteenth day of such month, on form prescribed, prepared and furnished by said director, a sworn statement of the number of pounds of butter substitute sold by it, him or them during the preceding calendar month, which statement shall be sworn to by one of the principal officers in case of a domestic corporation, or by the resident general manager or attorney-in-fact in case of a foreign corporation, or by the managing agent, or owner in case of a firm or association, and shall contain a statement of the quantities in pounds of butter substitute sold. Bills shall be rendered to dealers in butter substitutes as herein defined. Said bills shall contain a statement printed thereon in a conspicuous place that the distributor of such butter substitute has assumed the liability to the state for the license tax therein imposed and that he, it or they will pay said license tax on or before the fifteenth day of the following month.

* * * * * * *

"Sec. 8. It shall be unlawful for any person, firm or corporation dealing in butter substitute to receive or accept any delivery or shipment of butter substitute from any distributor or to pay for the same, or to sell or offer the same for sale, unless the statement provided for in section seven (7) appears upon the container and upon all invoices for such butter substitute. If any shipment of butter substitute is received by any person, firm or corporation from any distributor, or is sold or offered for sale by him or them, upon which the requirements of sections 4 and 7 of this act are not complied with, such person, firm or corporation shall be deemed guilty of a misdemeanor: Provided, That the provisions of this section shall not apply to the receipt or sale of butter substitutes which are exempt from state tax under the constitution and laws of the United States.

"Sec. 9. The director of agriculture shall have the power and it shall be his duty from time to time, to adopt, publish and enforce rules and regulations not inconsistent herewith for the purpose of carrying out the provisions of this act.

. . . . . .

"Sec. 12. Any distributor, association of persons, firm or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

. . . . . .

(The Act is set forth in full in the opinion on the merits of the above entitled cause, reported in 2 Fed. Supp. 417.)

C.

The date of the final decree of the District Court of the United States for the Western District of Washington sought to be reviewed is August 28, 1933.

The date on which the application for appeal was presented is October 21, 1933.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, A. Magnano Company, a corporation, commenced this suit in the District Court of the United States for the Western District of Washington, Southern Division, to enjoin the appellees and their predecessors in office from collecting of the appellant a tax of fifteen cents per pound upon each pound of alleged butter substitute sold by appellant, under Chapter 23 of the Laws of 1931 of the State of Washington, and to restrain any attempt by the said appellees, and their predecessors in office, to enforce the said statute and its penalties against the appellant.

On September 18, 1931, the appellant filed its amended bill of complaint in the above entitled cause, asserting the invalidity of Chapter 23 of the Laws of 1931 of the State of Washington under several clauses of the Federal Constitution, and praying that the defendants be temporarily and permanently enjoined from enforcing the Act as against this complainant. The said Act of the State of Washington was claimed, in the amended bill of complaint, to be invalid on the following grounds:

(*a*) For the reason that the said Act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process of law, and does and will deny to it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States;

(b) For the further reason that, in violation of the above mentioned Article XIV of the Amendments to the

Constitution of the United States, said Act deprives hundreds of prospective customers of complainant of their liberty in freely purchasing or entering into contracts to purchase said food product for their own consumption;

(*c*) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of oleomargarine in aid of the dairy industry, a private business;

(*d*) For the further reason that said Act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States;

(*e*) For the further reason that said Act violates Article I, Section 8, of the Constitution of the United States in that said Act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises.

The jurisdictional facts alleged in its amended bill of complaint are found by the three-judge court to be true in their entirety in its findings of fact, hereinafter set forth in detail in this statement as to jurisdiction, and therefore, in the interest of brevity, are not duplicated at this point.

Simultaneously with the filing of its said amended bill of complaint the appellant made its application for an interlocutory injunction, pursuant to Section 266 of the Judicial Code of the United States. The said application for an interlocutory injunction was heard before three judges, as required by said section of the Judicial Code, to wit, the Honorable Curtis D. Wilbur, Circuit Judge for-

the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington.

At the time of said hearing the defendants in said cause filed an answer, which included a motion to dismiss. The said three-judge court, on February 26, 1932, rendered its opinion denying complainant's application for an interlocutory injunction, but also denying the motion to dismiss interposed by the said defendants. The opinion of the three-judge court upon the interlocutory injunction and the motion to dismiss is reported in 2 Fed. Supp. 414.

Thereafter this complainant and appellant and the said defendants entered into a written stipulation of facts, and agreed that the said cause should be heard upon the merits upon said written stipulation of facts and such additional testimony as either of the parties desired to offer.

On September 13, 1932, the said cause came on for final hearing before the said three-judge court, pursuant to Section 266 of the Judicial Code, consisting of the same three judges who had heard the application for an interlocutory injunction. The said final hearing was had upon the said written stipulation of facts and very brief testimony extending not over fifteen or twenty minutes.

The three-judge court took the said cause under advisement, and on the 17th day of January, 1933, filed its opinion denying appellant's application for a permanent injunction against the statute complained of, and holding that the said suit should be dismissed. The opinion is reported in 2 Fed. Supp. 417.

Thereafter, owing to a change in the incumbency in office of the defendants, and upon appropriate showing and written consent of their successors, their said successors above named were, by appropriate order, substituted as parties defendant.

Thereafter, on the 28th day of August, 1933, the said three-judge court made its written findings of fact and conclusions of law, all as required by Equity Rule No. 70½, in which findings of fact the said three-judge court incorporated the entire stipulation of facts previously entered into by the parties, and several other matters adverted to in the brief oral testimony.

The said findings of fact and conclusions of law made by the said three-judge court on August 28, 1933, are as follows:

Findings of Fact.

I.

Complainant is a corporation duly organized and existing under and by virtue of the laws of the State of Washington and a resident and citizen of such state and has paid its annual license fee last due the State of Washington.

II.

Defendant G. W. Hamilton is the duly elected, qualified and acting attorney general of the State of Washington and a resident and citizen of said state and of the western district of Washington; defendant Walter J. Robinson is the duly appointed, qualified and acting director of agriculture of the State of Washington and a resident and citizen of said state and of the western district of Washington; and defendant Clarence D. Martin is the duly elected, qualified and acting governor of the State of Washington and a resident and citizen of said state and of the western district of Washington.

III.

That this is a cause of a civil nature in equity and that the matters in controversy arise under the Constitution

and laws of the United States and that the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs.

IV.

That the legislature of the State of Washington at its 1931 session regularly and duly enacted Chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

V.

That complainant for many years immediately prior and up to the enactment of said Chapter 23, Laws of 1931, was engaged in importing into the State of Washington from factories located in the State of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the State of Washington, an article of trade and commerce known as "Nucoa."

VI.

That said Nucoa is classified by the Government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said Government and over said entire period oleomargarine continuously has been and now is recognized by said Government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

VII.

That all things have at all times been, and are, done necessary to make said Nucoa comply with all Federal laws and regulations and all laws and regulations of the State of Washington relating to pure foods and the manu-

facture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other Federal laws and regulations, and all laws and regulations of the State of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been added, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times have been and are of good quality, and all oils and fats at all times have been and are refined at high temperature so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product *sui generis*.

VIII.

That, pursuant to Federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a

carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the State of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

IX.

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product *sui generis;* and that since the passage of the said Act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product *sui generis.*

X.

That for many years last past and continuously up to the effective date of said Act, the average annual sales of oleomargarine in the State of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the State of Washington, and approximately 3,700,000

pounds were shipped into the State of Washington from other states in the United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the State of Washington for many years last past and up to March 9, 1931, has had the characteristics and been sold under the conditions described in paragraphs VII, VIII, and IX of these findings of fact. That said oleomargarine of complainant and all other oleomargarine sold in the State of Washington at all times up to the passage of said Act was sold in direct competition with dairy butter produced in the State of Washington; that thousands of persons of moderate means in the State of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production of dairy butter in the State of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to September 13, 1932, the production of butter in the State of Washington has been at approximately the same rate per annum; that at the time of the passage of said Act the wholesale price of oleomargarine in the State of Washington was twenty cents a pound and the wholesale price of dairy butter in the State of Washington was thirty-two cents a pound; that at the time of the passage of said Act the retail price of said oleomargarine in the State of Washington was twenty-five cents a pound, and the retail price of butter in the State of Washington was from thirty-five to thirty-seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the State of Washington were approximately the same as they were at the time of the passage of said Act, and were approximately the same throughout the entire period since the passage of the Act and up to the filing of the amended bill;

that on the 13th day of September, 1932, the wholesale price of butter in the State of Washington was twenty-two cents a pound; and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant on the 13th day of September, 1932, was twelve cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the State of Washington at fourteen cents a pound, and said retail dealers in the State of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and September 13, 1932, there was a gradual and continuous decline of both said butter and oleomargarine prices down to said September 13, 1932, in the same general proportion as that above set forth.

XI.

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within the State of Washington of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the State of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the State of California and sold in the State of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged

two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of oleomargarine by the complainant in the State of Washington was as follows:

Year.	Pounds sold.
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the State of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said Act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the State of Washington for use and sale in the State of Washington, or imported into or sold in the State of Washington any such oleomargarine.

XII.

That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the State of Washington under the provisions of said Act for the reason that, since said date, no sales of oleomargarine subject to tax under said Act have been made; that since the effective date of said Act no applications have been made to the collector of internal revenue of the United States in the State of Washington for wholesale or retail licenses under the Federal statutes to sell oleomargarine in the State of Washington, nor have any such wholesale or retail deal-

ers' licenses been issued to dealers in the State of Washington under said Federal statutes since such date, nor has the Government of the United States derived any revenue from sales of oleomargarine within the State of Washington since such date.

XIII.

That for a long time prior to and up to the time said Act imposing a tax of fifteen cents per pound became effective, complainant imported into the State of Washington said Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the State of Washington at twenty cents per pound, who, in turn, sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said Act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said Act, could sell the same to retail dealers, and the price per pound at which retail dealers in the State of Washington could resell to the general public has remained the same, and that since the date of filing the amended bill down to September 13, 1932, there was a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacture, importing and/or selling oleomargarine within the State of Washington.

XIV.

That defendants and their respective predecessors in office have at all times since the effective date of Chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine

sold by them within the State of Washington. That the defendants state that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XV.

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding. That the complainant has no adequate remedy at law.

XVI.

That dairying is one of the basic industries of the State of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

XVII.

That according to the official report of the State Department of Agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000 pounds
Creamery butter	32,925,707 pounds
Ice cream	3,598,466 gallons
Cheese	8,264,332 pounds
Evaporated and condensed milk	54,545,568 pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,000

XVIII.

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403	pounds
Creamery butter	29,804,070	pounds
Ice cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85	

XIX.

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

XX.

That the real estate taxes paid by the farmers of the State of Washington on properties used to raise forage and feed for their cows are $8,436,482, and on personal property $2,402,272.

XXI.

That the complainant, after March 9, 1931, could not have sold any oleomargarine in the State of Washington except at a loss, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter. There is no proof that the tax does not give a reasonable profit on cost of

manufacture or on capital invested. (See 2 Fed. Sup. 417 at 422.)

From the foregoing findings of fact the court made the following

Conclusions of Law.

That the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, either (*a*) in that it levies a tax confiscatory in amount and has destroyed complainant's business, or (*b*) in that it is a tax for a private purpose.

II.

The said enactment of the State of Washington does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, either (*a*) in that it actually suppresses and destroys a legitimate business by means of a law not applicable to or equally operative upon other legitimate businesses, or (*b*) in that it imposes a tax in aid of a private industry.

III.

The said enactment of the State of Washington does not violate the commerce clause of the Federal Constitution.

IV.

That said enactment of the State of Washington does not constitute an unlawful interference with the Federal taxing power.

Complainant severally excepted to Conclusions of Law numbered I, II, III and IV, upon the ground that each of said conclusions is contrary to law and unwarranted by the

Findings of Fact, and each of the exceptions to the Conclusions of Law were allowed by the court.

On the basis of the foregoing Findings of Fact and Conclusions of Law, and on the same day, to-wit, August 28, 1933, the said three-judge court entered its final decree denying appellant's application for a permanent injunction and dismissing the action.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Herkness v. *Irion*, 278 U. S. 92;
Keokuk Bridge Co. v. *Salm*, 258 U. S. 122, 124;
Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245;
Clark v. *Poor*, 274 U. S. 554;
Stratton v. *St. Louis, etc. R. Co.*, 282 U. S. 10;
In re Buder, 271 U. S. 461;
Stephenson v. *Binford*, 287 U. S. 251;
Sterling v. *Constantin*, 287 U. S. 378;
Field Packing Co. v. *Tax Commission of Kentucky* (Three-judge Federal Court, Ky., April 20, 1933, holding claim as to invalidity of Kentucky ten cent per pound tax on oleomargarine substantial under 14th Amendment; not yet reported, but now on appeal to this Court), No. 541, October Term, 1933, argued Nov. 15, 1933;
Jelke Co. v. *Emery* (*Wis.*), 214 N. W. 369;
Darnell v. *Memphis*, 208 U. S. 113, 122;
Gramling v. *Maxwell*, 52 F. (2d) 256, 258;
Walling v. *Michigan*, 116 U. S. 446, 457, 458;
Minnesota v. *Barber*, 136 U. S. 313, 326;

Adams v. *Tanner*, 244 U. S. 590;
Weaver v. *Palmer Bros.*, 270 U. S. 402;
In re Quong Woo, 13 Fed. 229, 233;
Ex parte Crowder, 171 Fed. 250, 252;
McCallen v. *Massachusetts*, 279 U. S. 620, 626, 627;
Schollenberger v. *Pennsylvania*, 171 U. S. 1, 7-19;
Collins v. *New Hampshire*, 171 U. S. 30, 33;
Casey v. *United States*, 276 U. S. 413, 420;
Nigro v. *United States*, 276 U. S. 332, 353;
Mountain Timber Co. v. *Washington*, 243 U. S. 219, 237;
American Mfg. Co. v. *St. Louis*, 250 U. S. 459, 462;
South Carolina v. *United States*, 199 U. S. 437, 454;
Van Brocklin v. *Tennessee*, 117 U. S. 151, 155.

We respectfully submit that the Supreme Court of the United States have jurisdiction of this appeal by virtue of Section 266 of the Judicial Code (28 U. S. Code §380).

Respectfully submitted,

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